

DATE: September 18, 1997

F. Rozier Sharp, Regional Director
Region 17

Barry J. Kearney, Associate General Counsel
Division of Advice

Triple C Maintenance Company, Inc.	530-8045-6000
Case 17-CA-19243	530-8081-9300
	590-7500
	596-0440-1200

This Deklewa¹ Section 8(a)(5) case was submitted for advice on the issue of whether the Union was a Section 9(a) or Section 8(f) representative, where the recognition occurred in June 1993 and in its defense to a Section 8(a)(5) charge four years later, the Employer attacked the validity of the recognition.

FACTS

In June 1993, the Employer and the Union, Heat and Frost Insulators and Asbestos Workers Local 64, entered into a one-month agreement. The agreement followed the terms of the Tulsa Master Insulators Association multiemployer association contract, but the unit was single employer in scope. The agreement recited in Article II, Section 2, that:

The Employers [sic]... recognize Local 64 as the sole and exclusive bargaining agent for all mechanics and apprentices.... The represented employees described above constitute a unit appropriate for bargaining within the meaning of Section 9(a) of the National Labor Relations Act. The Employer agrees that this recognition is predicated on a clear showing of majority support for Local 64 indicated by bargaining unit employees.

On July 2, 1993, the Union filed its petition in Case 17-RC-11004 for a unit of all craftsmen and mechanics employed by all the employer-members of the association. The association then recognized the Union on a Section 9(a)

¹ John Deklewa & Sons, 282 NLRB 1375 (1987).

basis, and the Union withdrew the petition. The association and the Union signed a contract with a duration of a year. Subsequent association contracts were for a year and contained the foregoing recital that the recognition was on a Section 9(a) basis.

The Employer never joined the association. However, it signed "me-too" collective-bargaining agreements with the Union in mid-1993, 1994, and 1995. All contained provisions that the Employer recognized the Union on a Section 9(a) basis. The Employer orally agreed to be bound by the 1996 association agreement, and observed its terms and conditions, but did not sign it. During the 1996-1997 period, the Employer paid into both the Union health and welfare fund, and the Wage Equality Fund, a fund that subsidizes the wages of a signatory's employees when the signatory is competing against nonunion construction contractors. On at least three occasions during the 1996-1997 contract's term, the Employer sought permission to receive funds from the Wage Equality Fund.

By letter to the Union dated May 28, 1997, the Employer stated that it would not sign the 1996-97 agreement, which was scheduled to expire on July 16, 1997, nor any future agreement, and that it would not negotiate with the Union.

The Region's investigation reveals that the Employer employed no employees in June and July 1993. While the Union did represent a majority in September 1993, and at various times thereafter when the Employer employed employee-members referred to it from the Union hiring hall, the Union did not demonstrate its majority status to the Employer at those times. Upon these facts the Region would issue a Section 8(a)(5) complaint based on the Employer's repudiation of the 1996-1997 contract during its term.

ACTION

We concluded that absent settlement, complaint should issue alleging that the Employer violated Section 8(a)(5) by withdrawing recognition from the Union for the period after, as well as the period before, the expiration of the 1996-1997 contract. Section 10(b) bars consideration of the Employer's defenses that, despite the recitation in the 1993 and subsequent contracts that the recognition was on a Section 9(a) basis, the 1993 and subsequent contracts were on a nonmajority basis and/or a Section 8(f) basis.

1. Bryan Manufacturing Co.

In Bryan Manufacturing Company, 119 NLRB 502 (1957), UAW organizers actively engaged in organizing the employer's employees in July 1954. No employee had heard of any Machinists Union campaign until August 16 of that year. Nonetheless in a letter dated July 17, the Machinists claimed majority status and demanded recognition. The employer met with the Machinists on July 26 and August 10. The employer signed a Machinists collective-bargaining agreement on August 10, and the Machinists signed the agreement on August 12. The UAW took no further action after the recognition of the Machinists because of a no-raiding pact, and the charges were not filed until June and August 1955, well after the end of the Section 10(b) period.

The Machinists Union made no claim to this Agency that it enjoyed prerecognition majority status and refused to adduce any evidence of a pre-August 10 majority, giving rise to an adverse inference² that it lacked majority status. While there is no express finding that the employer knew that the Machinists lacked majority status, the employer revealed that in July, its counsel advised the employer that he "could get along" with the Machinists. In sum, the facts establish that both the union and the employer knew that the union lacked majority status at the time of recognition and that the employer did not wish to deal with the UAW.³ Nonetheless, the Supreme Court found, on the foregoing facts, that Section 10(b) barred the Board from finding a violation of the Act. Local Lodge No. 1424, IAM v. NLRB, 362 U.S. 411 (1962).

2. Limitations upon the right of a party to a collective-bargaining agreement to assert the invalidity of the relationship

² See, e.g., Intl. Union, Automobile Wkrs. v. NLRB, 459 F.2d 1329, 1335 ff. (D.C. Cir. 1972), discussing adverse inferences.

³ The doctrine that a nonmajority recognition violates Section 8(a)(2) even when the recognizing employer believes in good faith that the union enjoys majority status was well established at the time but was not invoked by the Board. The doctrine descended from International Metal Products Company, 104 NLRB 1076 (1953), cited with approval in Bernhard-Altmann-Texas Corporation, 122 NLRB 1289, 1292 (1959). The Board cited the case in Bryan, 119 NLRB at 506, but for a different proposition, namely for the manner in which the General Counsel proves lack of majority.

There is nothing in our Act which explicitly precludes a respondent from raising pre-Section 10(b) matters as a defense. However, the Board has established a number of doctrines that limit the right of a party to a contract to assert the invalidity of the underlying relationship. Among them are: the doctrine that an employer cannot claim loss of majority during the term of a contract;⁴ the doctrine of the presumption of regularity by reason of the existence of a contract, i.e., that the original recognition was presumptively lawful;⁵ the doctrine that the majority status of the contracting union at the time of the original recognition is not subject to attack after a reasonable period of time under a contract;⁶ and most pertinently, the doctrine that where there is a purported Section 9(a) contract in the building and construction industry, the employer has six months to attack the 9(a) nature of the contract and is thereafter foreclosed from arguing that the contract was really an 8(f) contract because the union lacked majority status at the time the employer recognized it. Casale Industries, 311 NLRB 951 (1993). At 953 and fn. 15, Casale cited Bryan Manufacturing Co., for the proposition that

[i]n nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.

These same principles would be applicable in the construction industry. (footnotes omitted)

By its reference to Bryan, the Board indicated that arguably tainted recognitions which the General Counsel could not attack by reason of Section 10(b) cannot

⁴ Hexton Furniture Co., 111 NLRB 342 (1955).

⁵ Shamrock Dairy, Inc., 119 NLRB 998, 1002 (1957), on remand 124 NLRB 494, 495 (1959).

⁶ Barrington Plaza and Tragniew, Inc., 185 NLRB 962, 964 (1970), modified 470 F.2d 669 (9th Cir. 1972).

constitute a defense to a Section 8(a)(5) charge. The Board has not suggested that, as between the contracting parties, there was a class of cases where the misconduct could not be attacked by the General Counsel but nonetheless could be asserted as a defense by the Employer. Casale has been followed in a number of C cases to bar belated attacks on the validity of contracts.⁷

In the instant case, in June and July 1993, the Employer executed collective-bargaining agreements which clearly granted the Union recognition on a Section 9(a) basis. It appears that at that time the Employer had no employees. At various times thereafter the Employer employed employees who were Union members. The Employer signed contracts with the Union in 1994 and 1995, both with the Section 9(a) language. It orally agreed to and observed the terms of the 1996-1997 master contract. Here, as in such cases as Decorative Floors, Inc., 315 NLRB 188 (1994), the parties, by their 1993 and subsequent contracts, clearly intended to establish a Section 9(a) relationship.⁸ Six months passed, and then another three and one-half years before the Employer asserted that the parties had a Section 8(f) relationship, despite the 9(a) language in the contracts. It is far too late in the day for the Employer now to attack the execution of the 1993 contracts.

Accordingly, the Region should allege that all of the contracts are what they purport to be, Section 9(a) contracts, and that the Employer acted unlawfully when it withdrew recognition from the Union effective with the end of its 1996-1997 contract.⁹

⁷ Triple A Fire Protection, 312 NLRB 1088, 1089; Hayman Electric, 314 NLRB 879, 887 fn. 8 (1994); Decorative Floors, Inc., 315 NLRB 188 (1994); MPP Fire Protection, Inc., 318 NLRB 840, 842 (1995); Goodless Electric Co., 321 NLRB 64, 66 (1996); Industrial Power, 321 NLRB 816, 819 (1996); American Automatic Sprinkler Systems, Inc., 323 NLRB No. 160 (1997).

⁸ See also American Automatic Sprinkler Systems, supra; Triple A Fire Protection, supra.

⁹ In Hotel & Restaurant Employees Local 274 (Warwick Caterers), 269 NLRB 482 (1984), the complaint alleged that the picketing union violated Section 8(b)(7)(C). The union claimed in its defense that the picketed employer was an alter ego of or single employer with a former union signatory. The union had filed Section 8(a)(1), (3) and (5) charges against the picketed employer which the Region had

B.J.K.

dismissed for insufficient evidence of violation. The Office of Appeals had sustained the Region. The ALJ, relying on established precedent, held that he was foreclosed by the dismissal from considering the allegation that the picketed employer and the former signatory were related. The Board reversed its established precedent and held that the union was entitled to a "full hearing" on its defense. The instant case differs from that case because here the respondent did not complain for four years, while there all events occurred within the 10(b) period. [*FOIA Exemptions 2 and 5*

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